United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 15, 1997

TO : B. Allan Benson, Regional Director
Region 27

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Sheet Metal Workers Local 9 (United McGill Corp.)
Cases 27-CC-846, 27-CE-39

584-1275-6700
584-3740-1700
584-3740-5900

This case was submitted for advice as to whether provisions in an agreement executed by employers and the Union pursuant to the Union's job targeting program, that would make benefits to the employer under the program contingent upon its agreements to subcontract only with other employers signatory to a Union contract and to purchase only products manufactured by local unionized employers, are violative of Section 8(e).

FACTS

Sheet Metal Workers Local 9 (the Union) represents multiple units of sheet metal workers employed by manufacturers and installers of heating, ventilation, and air conditioner components (HVAC employers) in the Denver, Colorado area. These include a multi-employer unit of employees of approximately 31 employers represented by the employer association SMACNA Colorado (SMACNA), single employer units of non-SMACNA members and SMACNA members that are not represented by SMACNA in bargaining (me-too signatories).

Most of the contractors whose employees the Union represents are "installation" contractors which install HVAC components at construction sites. These contractors normally fabricate the products they install, either on-site or at a shop to which their employees may rotate from the construction site. However, when the installation contractors cannot fabricate the materials they need in a timely fashion, or when the materials needed are complex or difficult to fabricate cost-effectively, they purchase materials from other installation contractors or from "pure manufacturing" contractors that primarily or exclusively fabricate HVAC components and do little or no installation work ("pure manufacturers"). The installation contractors

also occasionally purchase sheet metal components from several "kitchen" contractors, which custom-manufacture certain specialty items out of stainless steel.

SMACNA has signed the Union's Standard Form Union Agreement (SFUA) on behalf of 31 installation contractors, including Air Systems, Inc. (the Employer). The other installation contractors with which the Union has individual agreements have also signed some version of the SFUA, which contains a unit definition clause that includes in a single unit "all employees of the Association Employers and Non Association Employers who have a fully equipped Sheet Metal Shop engaged in . . . manufacture, fabrication, assembling, handling, erection, installation . . . of all ferrous or non-ferrous metal work . . . and of all airveyor systems . . . ." However, the "pure manufacturers" and the "kitchen contractors" within the Union's jurisdiction have not signed the SFUA, but are signatory to separate "manufacturing" agreements.

United McGill, the Charging Party, is a nationwide manufacturer of sheet metal duct and fittings. It has collective-bargaining agreements with various Sheet Metal Workers locals, but does not operate any facilities in the Union's jurisdiction and is not signatory to a contract with the Union.

In approximately September 1995, the Union developed a "Market Recovery Program" (MRP) to subsidize fringe benefit contributions on certain jobs where employers with which the Union had collective-bargaining agreements were bidding in competition with non-union firms. The program enables signatory contractors to bid more competitively for work against non-union contractors. The program works as follows: Every journeyman sheet metal worker represented by the Union, with the exception of journeymen working for the "kitchen" contractors, pays into the MRP fund by having $.50 per hour deducted from his paycheck. This includes journeymen who perform primarily or exclusively manufacturing work as well as those who perform, or are able to perform, installation work. The non-journeyman, lesser skilled "production" employees of the pure manufacturers do not pay into the MRP fund. Every contractor whose employees contribute to the fund may participate in the program. In order to participate, the contractor must apply for funding on a job-by-job basis and, if approved, must sign a Memorandum of Understanding whereby it agrees to abide by various "Rules for Contractor Eligibility." The contractor then pays less than the contractual fringe benefit

contribution on that job, and the Union makes up the difference by transferring monies directly from the MRP fund to the fringe benefit fund.

Paragraphs 9 and 10 of the MRP "Rules for Contractor Eligibility" state, in pertinent part:

> 9. Participating Contractors found to be subcontracting any work claimed in the jurisdiction of Sheet Metal Workers #9 and/or the Sheet Metal Workers' International Association to a non-signatory contractor, subject to the disputes settlement procedure, will immediately be disqualified from participation in the M.R.P. All monetary relief granted prior to the finding of this violation must be refunded to the M.R.P. (emphasis added).
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> 10. The participating Contractor agrees to purchase only locally fabricated sheet metal products whenever possible for installation on projects receiving assistance thru Sheet Metal Workers #9 Resolution 78/M.R.P.
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> All sheet metal products installed on these projects must bear the Sheet Metal Workers International Association Union Label and be manufactured at terms and conditions which are Equal to or better than those provided for in the Sheet Metal Workers #9 Collective Bargaining Agreement. (emphasis added.)

The MRP Policy and Guidelines state that failure to abide by the Rules may result in a fine of at least two times the amount of the subsidy that had been awarded the contractor and suspension from the program for some period of time.

In approximately June 1996, Air Systems bid on the HVAC work for the King Soopers No. 71 job, and entered into an MRP Memorandum of Understanding with the Union covering the work. In October, Air Systems purchased rectangular duct for the project from United McGill, with which it had regularly done business over the course of many years. Shortly thereafter, the Union determined that Air Systems was in violation of the MRP Rules because United McGill was not a local union manufacturer. The Union demanded payment of $20,208.24, or twice the MRP subsidy, and imposed a limit on Air Systems' ability to participate in future MRP

agreements. The dispute is now in arbitration pursuant to the MRP's disputes settlement procedure.

United McGill's charge asserts that Paragraph 10 of the Rules, which requires that Air Systems cease doing business with United McGill or suffer fines and suspension from the program, violates Section 8(e).[1] Thus, United McGill asserts that paragraph 10 is unlawful on its face, and cannot have an object solely of preserving work for unit employees since it permits purchases from local signatories who are not in the multi-employer unit. United McGill further asserts that the work Paragraph 10 "preserves" to employees of signatory employers is not "fairly claimable" work even to the multiple units participating in the MRP since it has been the custom of local unionized contractors to purchase more than half of their sheet metal products from non-local manufacturers.[2]

The Union asserts that Section 8(e) was not intended to apply to a program like the MRP, since it is an internal union program, not part of the collective-bargaining agreement, in which contractors voluntarily participate and receive subsidies totally financed by employee contributions. The Union further asserts that, even if Section 8(e) applies, Paragraph 9 is lawful because it was intended to apply only to on-site work and thus is protected by the construction industry proviso. With regard to Paragraph 10, the Union asserts that the bargaining unit established in the SFUA includes all employees of all employers signatory to that agreement, and that Paragraph 10 is merely an effort to preserve work for that unit.

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[1] United McGill did not challenge Paragraph 9 in its charge, and it does not appear that Paragraph 9 was applied in this case. Although the Region notes that Paragraph 9 contains an enforcement mechanism, while Paragraph 10 does not, there is a general enforcement mechanism provided in Paragraph V6 of the MRP Policy and Guidelines document.

[2] Thus, United McGill asserts that, although local unionized installation and manufacturing contractors manufacture most (although not all) of the types of products needed by installers, the installers' practice has been to purchase only 20-30% of the products needed from local entities and to purchase the rest from outside the Union's jurisdiction.

The Union further asserts that, even if there are multiple units of employees covered by Paragraph 10, neither the program nor the specific rules at issue herein have any object other than preserving work for employees that contribute to the MRP fund, which is not a goal that violates the spirit of Section 8(e). Thus, the Union asserts that Paragraph 10 merely insures that the work preservation goals of the MRP are fully accomplished by requiring that participating contractors put as many contributing employees to work as possible and not dissipate the effectiveness of the fund by purchasing materials from manufacturers not in the participating group. The Union contends that it has no goal of furthering unionization generally, and notes that United McGill, with which Air Systems was required to cease doing business, is a unionized contractor enjoying good labor relations with its employees' bargaining representative. Finally, the Union disputes the Charging Party's assertions that the fabrication work "preserved" by Paragraph 10 is not work "fairly claimable" by local union contractors.[3]

ACTION

We conclude that the Region should issue a complaint, absent settlement, alleging that Paragraph 10 of the "Rules for Contractor Eligibility" is unlawful under Section 8(e) of the Act, and that the Union has violated Section 8(b)(4)(A) by imposing a fine to coerce Air Systems to comply with an agreement violative of Section 8(e). The complaint should not challenge Paragraph 9 of the Rules, since the Charging Party has not charged that that Paragraph is unlawful, the Union reasonably contends that it is intended to apply only to on-site work, and it is difficult to conceive of work to be subcontracted by HVAC installation contractors - other than fabrication work specifically

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[3] The Union asserts that 95% of round duct used by signatory installers has been supplied by local signatory employers and that, with the exception of oval spiral duct, local firms manufacture all of the types of products purchased by the contractors. The Union does not assert a specific percentage of products other than round duct (e.g., rectangular duct, fire dampers, spiral pipe, flex and spin ends) that has traditionally been purchased from local signatory firms. According to the Union, oval spiral duct is never needed because employees can use round duct and fabricate their own "transitional" pieces on-site instead.

covered by Paragraph 10 - that would be off-site and not subject to the construction industry proviso.

As an initial matter, it is clear that Section 8(e) applies to any kind of union-employer agreement whereby the employer agrees to cease doing business with any other person, regardless of whether the agreement is incorporated in the parties' collective-bargaining contract and regardless of whether the employer has had any input into the structuring or endowment of the program containing the agreed-to cessation of business. Indeed, the Board has already determined that Section 8(e) applies to the kind of job targeting program at issue here.[4] The Board's recognition, in Manno Electric,[5] of the generally protected nature of job targeting programs does not exempt such programs from Section 8(e) when they contain restrictions that would violate that section of the Act.

Furthermore, the Region has concluded, and we agree, that Paragraph 10 has a "cease doing business" object that clearly extends beyond work preservation for a single bargaining unit. Thus, even were we to accept the Union's assertion that all signatories to the SFUA, including employers who have not authorized SMACNA to act as their bargaining representative, are in a single bargaining unit,[6] the "pure manufacturers" and "kitchen" contractors benefited by Paragraph 10 are not signatories to the SFUA but to other agreements with the Union covering different units. It is clear that Section 8(e) prohibits agreements that require a cessation of business between separate entities, absent a

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[4] See Sheet Metal Workers Local 91 (Schebler Co.), 294 NLRB 766 (1989), enfd. in pertinent part, 905 F.2d 417 (D.C. Cir. 1990) (agreement which prohibited the granting of economic relief under job targeting program, unless employers complied with "integrity clause" preventing "double breasted" operations, violated Section 8(e)).

[5] 321 NLRB 278 (1996).

[6] But see Ruan Transport Corp., 234 NLRB 241, 242 (1978), where contract clause stating, as here, that employees of all signatory contractors shall constitute one bargaining unit was not sufficient to bring signatory employer into consensual multi-employer unit.

limited exception for agreements that preserve work or benefits for bargaining unit employees.[7]

The Union's strongest argument in defense of Paragraph 10 is its assertion that this is not the kind of "hot cargo" agreement Congress intended to outlaw through Section 8(e). Thus, since the Union's object is solely to protect the investment of employees paying into the program, by insuring that all work related to jobs subsidized by the program goes to contributing employees, the Union allegedly has no object of organizing non-union employers or otherwise "satisfying union objectives elsewhere."[8] In this regard, the Board held in Puget Sound NECA[9] that an agreement to terminate a hiring hall the employer association had offered to its non-unionized members was not violative of Section 8(e), despite a "cease doing business" effect that could not be characterized as "work preservation." The Board noted that the union was protecting the apprenticeship program and hiring hall established in its contract with the association, did not seek to further broader union objectives, and the agreement could be permitted without "doing violence to the congressional intent embodied in Section 8(e)."[10] However, Paragraph 10's coverage reaches

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[7] See National Woodwork Mfrs. v. NLRB, 386 U.S. 612, 645 (1967). See also Painters Local 36 (Stewart Construction), 278 NLRB 1012, 1015 (1986). We note that even the "union standards" clause of Paragraph 10 is unlawful since the work assertedly preserved thereby includes non-unit work.

[8] See National Woodwork, supra, at 644-645.

[9] Electrical Workers IBEW Local 46 (Puget Sound NECA), 303 NLRB 48 (1991).

[10] Id. at 50-51. See also Operating Engineers Local 12 (Griffith Co.), 212 NLRB 343 (1974), reversed and remanded, 545 F.2d 1194, 93 LRRM 2834 (9th Cir. 1976) (agreement that contracting employers would not subcontract work to any contractor that was delinquent in payments to the industry-wide contractual fringe benefit funds did not violate Section 8(e), even though the agreement benefited employees outside the bargaining unit as well as those within it, because the agreement was needed to preserve a viable trust fund for all employees in the various units and therefore addressed the labor relations of each contracting employer with its own employees).

beyond even those employees contributing to the MRP fund in that it benefits employees of the "pure manufacturers" and "kitchen" contractors who do not contribute to the fund.[11] Therefore, it clearly satisfies broader union objectives than protecting the integrity of the MRP fund and insuring that all work related to jobs subsidized by the MRP program goes to contributing employees. Indeed, it requires a cessation of business with non-unionized employers for the benefit of Union members generally, and thereby violates both the letter and spirit of Section 8(e).[12]

Accordingly, the Region should issue complaint, absent settlement, consistent with the foregoing. The complaint should allege that the Union violated the Act by disqualifying Air Systems from participating in the MRP program, by seeking a refund of the fringe benefits paid on the King Soopers' job pursuant to the program, and by demanding that Air Systems pay a fine of two times the MRP subsidy. In this regard, we note that the MRP program itself does not violate the Act, and Air Systems was entitled to benefits under the program. Paragraph 10, which is facially unlawful and was applied in an unlawful manner to deny Air Systems MRP benefits and to impose a penalty fine, should be expunged in its entirety.

B.J.K.

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[11] Paragraph 10 also requires that any purchases from outside the geographical area, in the event that it is not possible to obtain the materials locally, be from union signatories, and those entities do not have employees contributing to the MRP fund.

[12] In view of our conclusion that Paragraph 10 is not limited to preserving work for employees that contribute to the MRP fund, it is unlawful even if the fabrication work it "preserves" is fairly claimable by local unionized contractors.